No. 4037

In The United States
Circuit Court of Appeals
For the Ninth Circuit

TOM PAPPAS, CHARLES H. FERGUSON and OLIVER THOMPSON,

Plaintiffs in Error,

vs.

THE UNITED STATES OF AMERICA,

Defendant in Error.

UPON WRIT OF ERROR TO THE UNITED STATES DISTRICT COURT FOR THE WESTERN DISTRICT OF WASHINGON, NORTHERN DIVISION.

HONORABLE JEREMIAH NETERER, *Judge.*

BRIEF OF CHARLES H. FERGUSON AND OLIVER THOMPSON, PLAINTIFFS IN ERROR.

EDWARD H. CHAVELLE,
Attorney for Plaintiffs in Error.

315-321 Lyon Building,
Seattle, Washington.

Gateway Printing Co.

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STATEMENT OF THE CASE.

An information was filed in this case charging plaintiffs in error, Charles H. Ferguson and Oliver Thompson, together with another plaintiff in error,

named therein, in three counts, with the possession, transportation and sale of intoxicating liquor, in violation of an Act of Congress passed October 28, 1919, known as the National Prohibition Act. This information was filed in the United States District Court of the Western District of Washington, Northern Division, on the 29th day of September, 1922. Plaintiffs in error were arraigned and entered a plea of not guilty, and were placed on trial (Tr. pp. 6-10).

At the conclusion of the trial the jury returned a verdict of guilty as charged in counts one, two and three of the information, as to all of the plaintiffs in error; and after motions in arrest of judgment and for a new trial were duly interposed and denied, plaintiffs in error were sentenced to serve a term of six months in the county jail and to pay a fine of $500, as to Charles H. Ferguson, and ninety days in the county jail as to Oliver Thompson (Tr. pp. 11-20).

The evidence of the Government tended to establish that on the 28th day of June, 1922, the defendant, Tom Pappas, a deputy sheriff in the employ of the sheriff of King County, entered into an arrangement to deliver to one Mooring, a Federal prohibition agent, intoxicating liquor, under an arrangement that if Mooring would wire the plaintiff in error, appas, for so much lubricating oil he would send him common stuff, and if he wanted the bonded stuff to say,

"high grade lubricating oil" (referring by "stuff" to intoxicating liquor). Thereafter, in a conversation with the Government witness, Mooring, the plaintiff in error, Pappas, said:

> "I have to hire a car to get this stuff. My own car is broken down and they will not get it fixed in time."

That was about twelve o'clock on the 30th day of June, 1922, and about four o'clock on the same day, the plaintiff in error, Pappas, in accordance with the arrangement with the Government agent Mooring, delivered two sacks. Mooring said, "What did you get " and Pappas said "Pebble Ford, what you ordered." There were some other sacks in the car and Mooring said, "What are the others?" and Pappas said, "I will deliver them further on." Then Pappas said, "What are you going to cover them up with?" Mooring said, "This tent," and he pulled the tent over to the garage door. Mooring said, "While you count the money out I will get the stuff out," and handed him the money a few feet outside the garage and walked into the garage on the side of his car. (Tr. pp. 56, 57).

The Government agent testified that all of the transactions were had with Pappas (Tr. pp. 58, 64, 653. The witness, Mooring, who carried out all of the negotiations leading up to the consummation of the completed transaction between Pappas and Mooring, in no way implicated the plaintiffs in error, Ferguson and Thompson (Tr. pp. 54-59).

None of the Government witnesses implicated the said plaintiffs in error Thompson and Ferguson, until the witness, Max Anderson, was called on behalf of the Government, and testified that after his arrest plaintiff in error, Pappas, said he was a deputy sheriff and had been working on Ferguson and Thompson for some time to get them.

MR. CHAVELLE: I object to that.

THE COURT: The objection is sustained.

MR. BROWN: I think it is admissible as conversation between the parties.

THE COURT: Propound the question again. (Last question read).

THE COURT: He may answer.

MR. CHAVELLE: Exception.

Mr. Pappas said he was a deputy sheriff, and had been working on Ferguson and Thompson for some time to land them for selling liquor (Tr. pp. 63, 64, 65).

The Government called L. Reagan, Federal prohibition agent, stationed at Seattle, who testified that after the arrest of the plaintiffs in error they were examined separately.

Q. What did you hear Mr. Pappas say at that time?

A. Mr. Pappas claimed to be a deputy sheriff and he said he was out to catch Mr. Ferguson.

MR. CHAVELLE: I object to that as far as Mr. Ferguson is concerned.

THE COURT: The objection is overruled. I will state this, gentlemen, I have instructed the jury from time to time, or suggested to them on these objections, that no statements made in the absence of a defendant may be considered as against him. That rule is rather broadly stated, and that in substance will still stand, but I may modify that some upon the instructions, upon this theory—well, I will not say anything further now. Proceed.

Q. Go ahead and tell what the conversation was.

A. The defendant Pappas was warned of his constitutional rights by Mr. Whitney and myself, and he claimed that he was a deputy sheriff and that he was out to get Ferguson, or find his cache, and the question was asked if he had mentioned this to the sheriff's office or to Matt Starwich, and he said he did not, and that he was trying to locate Ferguson's cache (Tr. pp. 74, 75).

During the examination of J. C. Hill, called as a witness on behalf of the plaintiff in error, Tom Pappas, the Court repeatedly sustained the objection of counsel for plaintiffs in error, Ferguson and Thompson as to the testimony of alleged reports made by the plaintiff in error, Tom Pappas, to the witness, J. C. Hill, a deputy sheriff, which referred to the plaintiffs in error, Ferguson and Thompson; but when Earl Ramage, a deputy sheriff in the employ of the sheriff of King County, was called as a witness for the said Tom Pappas the Court

admitted the same evidence which he had previously found objectionable.

Q. And was there any evidence as to the amount of liquor in the cache?

A. The evidence we had—we had several reports, and also had a report that—

MR. CHAVELLE: I object to that.

THE COURT: Proceed.

A. And the way the deal was to come up, he came to us, I think the morning previous to the time he got in this trouble, and he said he could get five cases delivered, and I went to see the sheriff, and the sheriff said, "We do not want five cases; we want his cache," and I told Tom that, and I think he was in the office at the time, and he said, "All right," he would do that, and we were to wait for them and he was to call us up and we were to wait for him at the office and we were going up and make the arrests when the liquor was delivered to him by this man Ferguson.

MR. CHAVELLE: I object to that.

A. (Continued). And from there he was to go to the cache. He was to take a load to Spokane.

MR. CHAVELLE: I object to that.

THE COURT: Proceed.

Q. You knew there was to be a delivery that he was mixed up in at that time

A. I did. (Tr. p. 82).

The plaintiff in error, Tom Pappas, was then called as a witness on his own behalf.

Q. Tell the jury what that was.

A. Well, I told Matt Starwich the case about Ferguson.

MR. CHAVELLE: Just a minute. I object to that as far as it affects either Mr. Ferguson or Mr. Thompson.

THE COURT: I think I will have to cover this whole matter by the instructions to the jury when the case is finally submitted. I am inclined to think that the rule of law applicable and upon which I would instruct the jury is that if the jury believe from all the evidence presented that there was a conspiracy confederation entered into between the defendants in this case to do the things charged in this information, that the statements made by any one of the defendants in the absence of the other defendants may be considered to determine whether they did the acts charged in the information—not that they could be found guilty of conspiracy in this case to violate the National Prohibition Act, but if the conspiracy or confederation was entered into between the parties, then a statement made by any of the parties who entered into the confederation or conspiracy to do the things charged here, could be received in evidence against all the parties who are charged here, and who participated in the actual thing. I will finally dispose of this in my instructions to the jury, as to whether

any statements as I have heretofore intimated, may be received against any one of the defendants where the statement was not made in his presence, but I am simply stating this to you now so that you will all be advised just the thought that is in my mind. Proceed.

MR. CHAVELLE: Will the Court let the witness answer this question?

THE COURT: He can answer.

MR. CHAVELLE. Note an exception.

The witness then proceeded to testify as follows:

A. And Mr. Matt Starwich called Mr. Ramage and Mr. Hill in and told them that I should go in the other office and talk over the matter and they would give me the instructions what to do.

Q. What instructions would they give you?

A. They told me to go out and locate Ferguson's house.

MR. CHAVELLE: My objection goes to all of this, and I want to note an exception.

THE COURT: Yes.

A. (Continuing) But he did not dare to take the sheriff's car but we could use one of my cars, because I had been using my car right along, and we went out and located his house.

Q. Was that at night?

A. In the afternoon, and at night they sent a

boy out there from the sheriff's department, planted him out there to stay all night and watch Ferguson's movement. He did not find anything that day and in five or six—

MR. ALLEN: The witness should only testify as to what he knows from his personal knowledge.

THE COURT: State what you yourself did.

A. (Continuing) And then I went to the office and they told me which way was the best way to find out, and I said, "I do not know."

Q. What were you trying to find out?

A. I was trying to find out 200 cases that Mr. Ferguson was supposed to have at Ballard Beach.

Q. And what took place?

A. And I can get five cases—

THE COURT: Not the conversation, but what he did.

A. And they told me to go out there and gain confidence with Ferguson.

Q. What did you do?

A. And I told Ferguson—

Q. Did you go to see Mr. Ferguson?

A. Yes, sir.

Q. When did you first see him?

A. I saw him before that. He came down there all the time.

Q. After they gave you the instructions what did you do?

A. In the meantime this Mooring came down there.

Q. Never mind about Mooring. Did you see Ferguson before you saw Mr. Mooring?

A. Yes, sir.

Q. What was that conversation?

A. I told him if there was any possible chance to get 25 cases on the other side of the mountains and he said, "Yes," and I said, "I do not believe you have that much whiskey; I would like to see where this liquor is," and he did not like to take me down there, and he went back there, and I told Mr. Hill and Ramage what I did, and they said to try to get his confidence in any way you can—

THE COURT: Do not give us so much conversation with the sheriff's office. (Tr. pp. 85-88).

The plaintiffs in error, Ferguson and Thompson, denied any identification whatsoever with Pappas or with the transaction, except that Ferguson admitted he and his car were employed by Pappas for the reason Pappas claimed his own automobile had broken down. Ferguson was instructed to drive out to Magnolia Bluff and pick up some packages and bring them down to the Times Square and meet Pappas. By reason of an engagement he previously had it was necessary for him to stop on Pike Street in the City of Seattle, and there he

saw Thompson and asked Thompson if he cared to ride along. Thompson had nothing whatsoever to do with the transaction except as a guest in the car; that neither of the defendants had ever met Mooring or had any conversation with him nor with any of the other Government witnesses until after their arrest.

The questions presented in the record are:

I. Did the Court err in admitting the evidence of the Prohibition agents of declarations made to them by plaintiff in error, Tom Pappas, after his arrest, and without the presence of the plaintiffs in error, Ferguson and Thompson, and to the previous statements of the said Tom Pappas made to the deputy sheriffs without the presence of the said plaintiffs in error, Ferguson and Thompson, as to his conversations regarding their violations of the law, and the statements of the plaintiff in error, Tom Pappas, himself, as to what was said to him by the sheriff and what he said to the sheriff regarding said plaintiffs in error, without their presence?

2. Did the Court err in overruling counsel's for plaintiffs in error Motion in Arrest of Judgment and for a new Trial?

3. Was the jury properly instructed?

ASSIGNMENTS OF ERROR

Assignment No. I.

The Court erred in admitting incompetent evidence to the defendant's prejudice in this, to-wit:

Earl Ramage, called as a witness on behalf of plaintiff in error, Tom Pappas, testified as follows:

Q. And was there any evidence as to the amount of liquor in the cache?

A. The evidence we had—we had several reports, and also had a report that—

MR. CHAVELLE: I object to that.

THE COURT: Proceed.

A. And the way the deal was to come up, he came to us, I think the morning previous to the time he got in this trouble, and he said he could get five cases delivered, and I went to see the sheriff, and the sheriff said, "We do not want fiave cases; we want his cache," and I told Tom that, and I think he was in the office at the time, and he said, "All right," he would do that, and we were to wait for them and he was to call us up and we were to wait for him at the office and we were going up and make the arrests when the liquor was delivered to him by this man Ferguson.

MR. CHAVELLE: I object to that.

A. (Continued). And from there he was to go to the cache. He was to take a load to Spokane.

MR. CHAVELLE. I object to that.

THE COURT: Proceed.

Q. You knew there was to be a delivery that he was mixed up in at that time?

A. I did (Tr. p. 82).

The plaintiff in error, Tom Pappas, was called as a witness on his own behalf.

Q. Tell the jury what that was.

A. Well, I told Matt Starwich the case about Ferguson—

MR. CHAVELLE. Just a minute. I object to that as far as it affects either Mr. Ferguson or Mr. Thompson.

THE COURT: I think I will have to cover this whole matter by the instructions to the jury when the case is finally submitted. I am inclined to think that the rule of law applicable and upon which I would instruct the jury is that if the jury believe from all the evidence presented that there was a conspiracy confederation entered into between the defendants in this case to do the things charged in this information, that the statements made by any one of the defendants in the absence of the other defendants may be considered to determine whether they did the acts charged in the information—not that they could be found guilty of conspiring in this case to violate the National Prohibition Act, but if the conspiracy or confederation was entered into between the parties, then a state-

ment made by any of the parties who entered into the confederation or conspiracy to do the things charged here, could be received in evidence against all the parties who are charged here, and who participated in the actual thing. I will finally dispose of this in my instructions to the jury, as to whether any statements as I have heretofore intimated, may be received against any one of the defendants where the statement was not made in his presence, but I am simply stating this to you now so that you will all be advised just the thought that is in my mind. Proceed.

MR. CHAVELLE: Will the Court let the witness answer this question?

THE COURT: He can answer.

MR. CHAVELLE: Note an exception.

The witness then proceeded to testify as follows:

A. And Mr. Matt Starwich called Mr. Ramage and Mr. Hill in and told them that I should go in the other office and talk over the matter and they would give me the instructions what to do.

Q. What instructions would they give you?

A. They told me to go out and locate Ferguson's house.

MR. CHAVELLE: My objection goes to all of this, and I want to note an exception.

THE COURT. Yes.

A. (Continuing). But he did not dare to take the sheriff's car but we could use one of my cars,

because I had been using my car right along, and we went out and located his house.

Q. Was that at night?

A. In the afternoon, and at night they sent a boy out there from the sheriff's department, planted him out there to stay all night and watch Ferguson's movements. He did not find anything that day and in five or six—(Answering continued). And then I went to the office and they told me which was the best way to find out, and I said, "I do not know."

Q. What were you trying to find out?

A. I was trying to find out 200 cases that Mr. Ferguson was supposed to have at Ballard Beach.

Q. And what took place?

A. And I can get five cases—

THE COURT: Not the conversation, but what he did.

A. And they told me to go out there and gain confidence with Ferguson.

Q. What did you do?

A. And I told Ferguson—

Q. Did you go to see Mr. Ferguson?

A. Yes sir.

Q. When did you first see him?

A. I saw him before that. He came down there all the time.

Q. After they gave you the instructions what did you do?

A. In the meantime this Mooring came down there.

Q. Never mind about Mooring. Did you see Ferguson before you saw Mr. Mooring?

A. Tes sir.

Q. What was the conversation?

A. I told him if there was any possible chance to get 25 cases on the other side of the mountains and he said, "Yes," and I said, "I do not believe you have that much whiskey; I would like to see where this liquor is," and he did not like to take me down there and he went back there, and I told Mr. Hill and Mr. Ramage what I did, and they said to try to get his confidence in any way you can.

THE COURT. Do not give us so much conversation with the sheriff's office.

Q. What did you do?

A. What did I do when?

Q. After you had gone out to see Mr. Ferguson and asked if he could make a delivery of 25 cases east of the mountains then you went back and made a report?

A. Yes.

Q. Then what did you do?

A. At that time this Mooring came down.

Q. Had you seen Mr. Mooring before?

A. Yes sir.

Then continuing, the plaintiff in error, Pappas, told Mooring he would try to get the whiskey and said, "How are you going to take the whiskey, and he said, "I have my house here; I can show you and I have my car," and I (Pappas) said, "I would like to see it," and he took me up there and showed me his house, showed me his car, and I said, "All right, as soon as I get this fellow I will send him to you and you can do business with him," and he said, "I would like to do business with you."

Q. Never mind that. What did you do then?

A. I was meeting Mr. Ferguson.

Q. You tried to meet Mr. Ferguson?

A. Yes sir.

Q.And what was your purpose in negotiating this transaction?

A. I thought if Mr. Ferguson went to get this whiskey for Mr. Mooring he would take me to the cache.

MR. CHAVELLE. Just a minute. My objection goes to all this testimony.

THE COURT: Yes, proceed. (Tr. pp. 85-92).

Max Anderson, a Federal prohibition agent, called as a witness on behalf of the Government, over the objection of counsel, was permitted to testify that plaintiff in error (Pappas) did not say anything at the time, but they took him in the house

and then Pappas said he was a deputy sheriff, and had been working on Ferguson and Thompson for some time, to get them.

MR. CHAVELLE. I object to that.

THE COURT. The objection is sustained.

MR. BROWN: I think it is admissible as conversation between the parties.

THE COURT. Propound the question again. (Last question read).

THE COURT: He may answer.

MR. CHAVELLE: Exception.

MR. ANDERSON (Continuing): Mr. Pappas said he was a deputy sheriff, and had been working on Ferguson and Thompson for some time to land them for selling liquor.

W. M. WHITNEY, called as a witness on behalf of the Government, testified he was assistant prohibition director and legal advisor, and as follows:

A. Mr. Pappas at that time stated that he had employed or gotten in touch with Mr. Ferguson to deliver some whiskey—

MR. CHAVELLE: I object to the conversation for the reason that it is incompetent, irrelevant, immaterial, and no proper foundation has been laid for the question; no showing whether the statement was voluntary or involuntary and whether the defendants were under arrest.

THE COURT: The defendants were all together there?

A. The conversation—my examination was separately, but I warned each one of them first of their constitutional right and told them they did not have to say anything, and anything they said would be used against them, and they did nto have to say anything that would incriminate themselves, and what was said would have to be said freely and voluntarily.

MR. CHAVELLE: I object to what Mr. Pappas said as not being in the presence of Mr. Ferguson or Mr. Thompson.

THE COURT: The jurors will not consider any statements on the part of Mr. Pappas with relation to any of the other defendants, that was not made in the presence of the other defendants. Let me ask you, Mr. Allen, does this statement you are seeking to elicit from Mr. Pappas, is that with relation to himself more particularly, or to the other defendants?

MR. ALLEN: The statement that Mr. Pappas made to Mr. Whitney was with relation to himself. I will limit my question to that extent.

THE COURT: Yes.

The witness Whitney, continuing, then testified that Pappas had told him that he had talked two or three days previously with Deputy Sheriffs Hill and Ramage about apprehending Mr. Ferguson.

MR. CHAVELLE: I object to any conversation about Mr. Ferguson.

THE COURT: The jurors will disregard any statements made by Mr. Pappas as to the defendants Ferguson and Thompson.

MR. WHITNEY (continuing): I then asked him if he had notified the sheriff's office or any of the deputies in the sheriff's office, or any representative of that office, as to this deal with Mr. Mooring, and he stated he had not. I asked him if he intended to arrest Mr. Mooring or Mr. Ferguson or Mr. Thompson, or any one else, and he said he did not intend to arrest them at that time, but intended to report to the sheriff's office later, and I asked him if he did not intend to make an arrest how he expected me to believe he was acting in good faith as a deputy sheriff, and he then stated he thought if he could play Mr. Ferguson along he might find out where he kept his cache.

MR. CHAVELLE: I object to that for the same reason.

THE COURT: Yes. The jurors will disregard that.

A. (continuing) I do not want to answer improperly, but in order to state—

THE COURT: I understand.

The Witness Whitney continuing: I asked him how they were riding out there, and he said the three of them were in the front seat, and Mr.

Ferguson was driving the car. I asked him where he had gotten in touch with Mr. Ferguson.

MR. CHAVELLE. I object to that. I do not think that is fair to tell that to this jury. Certainly not.

THE COURT: I am inclined to think that is getting—

On cross-examination by Mr. Brown, attorney for the plaintiff in error, Pappas, Whitney testified:

Q. He did tell you in that conversation that he had had a conversation and had been talking with Mr. Hill and Mr. Ramage about Mr. Ferguson some days prior?

MR. CHAVELLE: Just a minute. I object to that. He is attempting to secure by cross-examination what the Government could not get by direct examination.

(Last question read).

MR. BROWN: This goes to the gist of the defense of Mr. Pappas. If he acted in conjunction with the sheriff's office he could not be convicted here.

THE COURT: I think that the question should be answered, and the jury will not consider this as any evidence against Mr. Ferguson.

A. Yes, he made some mention of that.

Q. Did he tell you also that Sheriff Starwich

had instructed Mr. Hill and Mr. Ramage to run this gang of bootleggers down?

MR. CHAVELLE: I object to that.

MR. BROWN: It is not anything to laugh about, Mr. Whitney. You are a witness here.

THE COURT: Let him answer.

A. No, sir, he did not tell me or that Mr. Starwich had told his deputies.

Whitney, the witness, then testified, that Pappas had said, "I went to Mr. Hill and Mr. Ramage, and told them that I believed I could get Mr. Ferguson, and they requested me to do it if I could." (Tr. pp. 67-74).

All of this testimony was subsequently admitted over objection of counsel for the plaintiffs in error, Ferguson and Thompson, under a change in the Court's ruling.

L. Reagan, called as a witness on behalf of the Government, testified as follows:

MR. REAGAN: Mr. Pappas claimed to be a deputy sheriff, and he said he was out to catch Mr. Ferguson.

MR. CHAVELLE: I object to that as far as Mr. Ferguson is concerned.

THE COURT: The objection is overruled. I will state this, gentlemen, I have instructed the jury from time to time, or suggested to them on these objections, that no statements made in the absence of a defendant may be considered as against him. That rule is rather broadly stated, and that in sub-

stance will still stand, but I may modify that some upon the instructions, upon this theory—well, I will not say anything further now. Proceed.

Q. Go ahead and tell what the conversation was.

A. The defendant Pappas was warned of his constitutional rights by Mr. Whitney and myself, and he claimed that he was a deputy sheriff and that he was out to get Ferguson, or find his cache, and the question was asked if he had mentioned this to the sheriff's office or to Matt Starwich, and he said he did not, and that he was trying to locate Ferguson's cache. (Tr. pp. 74-75).

Assignment No. II

The Court erred in instructing the jury is relation to a conspiracy:

> "You are instructed, as a matter of law, any statement made by a defendant himself is always admitted, but a statement made in the absence of a person, so that he did not have an opportunity to contradict or to deny it, is not, as a general rule of law, admitted; and at the inception of the trial when the first objection was made, I limited the answer to the defendant who had made the statement. As the trial developed, I observed to counsel, so they would be advised, that possibly a statement under the circumstances, might be taken here in this sort of a case, against a party, when made in his absence, and you are instructed, gentlemen of the jury, that if you believe in this case that

the defendant Pappas and the defendant Ferguson, entered into a conspiracy or confederation, and including the defendant Thompson, if the testimony warrants it, but if they entered into a conspiracy or confederation for the purpose of having transported and sold this whiskey charged in this indictment, then you are instructed that a statement made by either of the parties in the absence of the other party would be admissible in evidence in this trial against such other party, the theory being that if the parties entered into a conspiracy or confederation, then each party entering into that conspiracy or confederation, constituted the other party his agent for the purpose of carrying forward the particular thing that they had conspired to do, and when a person constitutes another his agent to do a particular thing, then he is bound by what the person does or says, in carrying out that particular thing.

So, in this case, if you believe that the defendant Pappas, and the defendant Ferguson entered into a conspiracy, whether the defendant Thompson was a part of that conspiracy or not, then believing that to be established in your mind, you would have a right to consider a statement made by either of the defendants in the absence of the other, testified to in this case.

But, if such conspiracy or confederation has not been established, then you may not consider a statement testified to as made here in the absence of such defendant, against that defendant, but it can only be considered against the person who made it." (Tr. pp. 114-117).

MR. CHAVELLE: I take exception to the instructions of the Court relating to conspiracy. I contend there is no evidence of any such an agreement.

THE COURT: Very well. You may retire, gentlemen of the jury (Tr. pp. 199-120).

Assignment No. III.

The Court erred in refusing to grant defendants' motion for a new trial on the following grounds:

1. That the said verdict was against and contrary to the said law.

2. That the said verdict was against and contrary to the said evidence.

ARGUMENT.

Error in the admission of evidence is claimed under Assignment No. 1. Assignment No. 2 is directed to the error in the instructions given by the Court and Assignment No. 3 goes to the merits of the entire case upon the Court's refusal to grant a new trial.

The first division of Assignment No. 1 goes to the admission by the Court of the testimony of Prohibition agents as to what Tom Pappas, an alleged deputy sheriff, said to them after his arrest and the

arrest of the plaintiffs in error Ferguson and Thompson, while they were being examined by the said prohibition agents separately; said declarations being made by said Pappas without the presence of said plaintiffs in error Ferguson and Thompson; and further, upon reports made by Tom Pappas to the deputy sheriffs, and to Pappas' own statement after he was under arrest as to the position he bore to the plaintiffs in error, which was admitted to go to the jury over the objection of their counsel, and which was prejudicial to the said plaintiffs in error and contrary to law.

The theory upon which the Court proceeded, after persistently sustaining the objections to this class of evidence, was that when a conspiracy is once established, acts or admissions of any one of the conspirators in pursuance of the conspiracy and while it continues, are admissible against the others, upon the theory that the conspirators are agents for one another in the common enterprise.

Connecticut Mutual Life Ins. Co. vs. Hillman, 188 U. S. 218.

But the preliminary question whether sufficient evidence of a conspiracy has been adduced must always *be answered by the Court in the affirmative* as the general rule of evidence. excluding hearsay, will render an admission of one of the conspirators inadmissible against the others.

In this case it is admitted there is no charge of a conspiracy. Nor is it necessary there should

have been such a charge, but the question itself must have been answered by the Court before the declarations and acts of a conspirator could be admitted against his co-conspirator. The Court did not answer this question itself, but as we shall later see, passed it to the jury to decide whether or not there was a conspiracy, even though the alleged declarations which were objectioanble were made by the alleged conspirator after his arrest when the conspiracy, if any, must have ceased. There was no charge of a conspiracy nor did the Government attempt to prove one. The transaction was clearly an agreement between the Government agent, Mooring, and the plaintiff in error, Tom Pappas, for the sale and delivery of whiskey by Pappas to Mooring. Subsequently and after his arrest, Pappas sought to escape the consequences of his acts and declarations by stating that he was himself a deputy sheriff and employed by the sheriff of King County to locate the cache of Ferguson; that he is, himself, innocent of any wrongdoing except that of attempting to apprehend a violator of the law named Ferguson. These admissions and declarations communicated to the Federal prohibition agents and to the deputy sheriffs are received by the Court as evidence against plaintiffs in error Ferguson and Thompson. In this case there is an entire absence of evidence to prove an unlawful combination between Pappas and Ferguson. There is no rule which renders the declarations of an alleged conspirator, given second-handed, admissible to prove

the existence of a conspiracy. Such declarations are made competent only after the conspiracy has been shown to exist.

The case of *Stager vs. U. S.,* 233 Fed. 510, at page 513 reversed the lower court because the preliminary question as to whether or not sufficient evidence of conspiracy had been offered was not not answered by the Court and the general rule of excluding hearsay which would render an admission of one of the conspirators inadmissible against the others should have been exercised by the Court.

In the case at bar the existence of a conspiracy was not shown and there was not a particle of competent evidence of a conspiracy. But, nevertheless, the declarations and admissions of Pappas were admitted as against Ferguson and Thompson.

In the case of *Hanger vs. U. S.,* 173 Fed. 59, the court said:

> "It is a well settled principle of evidence that in a trial on an indictment for conspiracy, after the unlawful agreement has been shown, the acts and declarations of co-conspirators are admissible as a part of the *res gestae.* For this reason the conspiracy must be proved prima pacie or such acts and declarations are inadmissible.
>
> 3 Greenleaf on Evidence (16th Ed.), Sec. 94, Note 1.

In this case there is an entire absence of evidence to prove the unlawful combination, the only evidence being that Pappas was engaged as a deputy sheriff to apprehend Ferguson and to locate his cache of 200 cases of whiskey and it was agreed with Mooring to sell him the whiskey; and that after he brought Mooring and Ferguson together he was going to notify the sheriff. But he never had any agreement with Ferguson except that his car was broken down and he had engaged Ferguson and his car. Mooring and Ferguson had never met until after the arrest. Pappas never alleged any agreement with Ferguson or Thompson, nor was any attempted to be proved.

The case last cited holds that only after the unlawful combination has been established, so as to make the acts and declarations competent as evidence, are such acts and declarations as were committed and made in the course of the conspiracy and in the furtherance of its object admissible. The declarations of Pappas which were admitted in the trial of this case, were as the record shows, made after his arrest and after the overt act had been committed and the purpose of the alleged conspiracy had been accomplished. For these further reasons the declarations were inadmissible as evidence against the plaintiffs in error, Ferguson and Thompson.

> "In all cases the testimony of the admissions or loose conversation should be cautiously received, if received at all. They are incapable

of contradiction. They are seldom anything more than vague expressions of a witness of what he thinks he has heard another say, stated in his own language without the qualifications or restrictions, the tone, manner or circumstances which attended the original expression."

Dalton vs. U. S., 63 U. S. 442.

It is not necessary to refer to any rule or to cite any authorities in regard to the inadmissibility of hearsay evidenec, but we call attention to a leading case on that subject:

Queen vs. Hepburn, 1 U. S. 290.

The Court cannot assume the existence of a conspiracy for the purpose of receiving evidence of the acts or declarations of an alleged conspirator.

People vs. Smith, 162 N. Y. 520.

But the acts and declarations in order to be admissible must have been made in furtherance of the common design. Acts and declarations of conspirators which do not relate to the conspiracy or which are not in furtherance thereof are not admissible over objection.

Dolan vs. United States, 123 Fed. 52;
United States vs. Reid, 210 Fed. 486;
Shea vs. United States, 251 Fed. 440;
United States vs. Schenck, 253 Fed. 212;
Boyle vs. United States, 259 Fed. 803;
Holsman vs. United States, 248 Fed. 103;
Harrington vs. United States, 267 Fed. 97;
Parilla vs. United States, 280 Fed. 761.

In order that the acts or declarations of a conspirator shall be admissible against a co-conspirator they must have been done or made during the existence of the conspiracy.

Steer vs. U. S., 192 Fed. 11.
Logan vs. United States, 144 U. S. 263;
Goll vs. United States, 166 Fed. 419;
Fain vs. United States, 209 Fed. 525;
Feder vs. United States, 257 Fed. 694.

It is not permissible to introduce in evidence as against a conspirator the acts or declarations of a co-conspirator which were done or made after the conspiracy had come to an end.

McDonald vs. U. S., 241 Fed. 973;
Erber vs. U. S., 234 Fed. 221;
Farr vs. U. S., 209 Fed. 525.

Arrest of the co-conspirators usually will preclude so effectually any further concerted action as to put an end to the conspiracy and acts or declarations of one conspirator after his arrest are, therefore, not admissible against another.

Hauger vs. U. S., 173 Fed. 54.

The last case cited, as in the case at bar, is where the declarations complained of were made by the declarant after his arrest.

Where although several persons are charged with the same crime it is not shown that there was a conspiracy between them, the acts or declarations of one, done and uttered out of the presence or hearing of another, are not admissible against the latter.

Fitzpatrick vs. U. S., 178 U. S. 304;
Sparf vs. U. S., 156 U. S. 51;
Hayes vs. U. S., 231 Fed. 106; affirmed 242 U. S. 470;
Itow vs. U. S., 223 Fed. 25;
Tresca vs. U. S., 183 Fed. 736.

The general rule is that the existence of the conspiracy must be proved, at least prima facie, to the satisfaction of the judge, before the declarations or acts are admitted in evidence.

Underhill Criminal Evidence, Third Edition, 966, Sec. 720;
Stager vs. United States, 233 Fed. 510.

What was in the trial Court's mind in admitting the evidence of the various prohibition agents and the deputy sheriffs with reference to the statements made to them by Tom Pappas after his arrest when he had previously so consistently ruled against the admission of the same evidence is without the province of counsel to explain, as the trial Court, itself, utterly failed to answer the question that there was a conspiracy between the various plaintiffs in error, and there is not a scintilla of evidence in the case which would warrant such a finding.

The submission of such evidence to a jury was highly prejudicial to the plaintiffs in error, Ferguson and Thompson, in that it submitted for their consideration the rankest kind of hearsay testimony, in conjunction with the Court's instruction that that such a confederation might exist, where there

was neither the charge nor the proof to sustain it. It gave the jury the opportunity to assume that Ferguson was a huge operator in the illicit occupation of bootlegging, having on hand a cache of over 200 cases which the authorities were tyring to locate, and the deputy sheriffs were permitted to testify that this was their purpose in employing Pappas, while the evidence clearly disproved any such actual condition, an destablished only that Ferguson, by reason of a circumstance that Pappa's car happened to be out of repair, was himself engaged, together with his automobile, by Pappas. This was Pappas' statement to Mooring at the time the agreement for the purchase of the liquor and sale were consummated, and was the statement of all the prohibition agents as to the actual facts leading up to the arrest.

Thompson was only injected into the deal by having the misfortune to have met his acquaintance, Ferguson, and being asked to ride along. There is no other evidence by any of the witnesses, even Pappas, that Thompson had a cache or that he was trying to apprehend him. He surely was not a member of any confederation to violate the law, and still all of the testimony of the various witnesses as to what Pappas told them, after he had been arrested and was trying to escape the consequences of his acts leading up to the making of an agreement with the Government agent, Mooring, and after the existence of any alleged conspiracy must have ceased, resulted in Thompson's being

drawn into a drag net that whether the plaintiffs in error had been either three or fifty, under the Court's admission of the testimony complained of, they would probably all have been convicted, innocent or guilty.

The only conclusion that can be drawn from the admission of this testimony was that Ferguson was a bad man; that the authorities were after him; that the secret reports in the sheriff's office disclosed this state of affairs; all upon the testimony of witnesses whom the jury in all respects believed by reason of their official positions as sheriffs and prohibition agents, and under the direction of the court that they had a right to receive and weigh this character of hearsay evidence.

The only agreement disclosed in the case by the evidence was the agreement between Mooring and Pappas, and neither Pappas nor any of the other witnesses testified that Ferguson or Thompson were members of any confederation, but instead Pappas was an officer pursuing Ferguson, fully deputized so to do in order to apprehend him for violation of the law or to locate his cache. Where at any time there was any evidence of any confederation between Pappas and Ferguson and Thompson, the record fails to disclose. The Court left the question as to whether there was a conspiracy unanswered and submitted that the jury might consider this objectionable testimony if they found that a conspiracy existed, without having first himself

answered this question; that sufficient evidence of a conspiracy had been adduced that the Court might answer in the affirmative that a conspiracy existed; and it was upon this character of hearsay evidence that the plaintiffs in error were convicted.

SECOND

In this subdivision we will discuss:

First, the error of the Court in instructing the jury in relation to a conspiracy as follows:

> "You are instructed, as a matter of law, any statement made by a defendant himself is always admtited, but a statement made in the absence of a person, so that he did not have an opportunity to contradict or to deny it, is not, as a general rule of law, admitted; and at the inception of the trial, when the first objection was made, I limited the answer to the defendant who had made the statement. As the trial developed, I observed to counsel, so they would be advised, that possibly a statement under the circumstances, might be taken here in this sort of a case, against a party, when made in his absence, and you are instructed, gentlemen of the jury, that if you believe in this case that the defendant Pappas and the defendant Ferguson, entered into a conspiracy or confederation, and including the defendant Thompson, if the testimony warrants it, but if they entered into a conspiracy or confederation for the purpose of having transported and sold this whiskey charged in this indictment, then you are instructed that a statement made by either of the

parties in the absence of the other party would be admissible in evidence in this trial against such other party, the theory being that if the parties entered into a conspiracy or confederation, then each party entering into that conspiracy or confederation, constituted the other party his agent for the purpose of carrying forward the particular think that they had conspired to do, and when a person constitutes another his agent to do a particular thinv, then he is bound by what the person does or says, in carrying out thta particular thing.

So, in this case if you believe that the defendant Pappas, and the defendant Ferguson entered into a conspiracy, whether the defendant Thompson was a part of that conspiracy or not, then believing that to be established in your mind, you would have a right to consider a statement made by either of the defendants in the absence of the other, testified to in this case.

But, if such conspiracy or confederation has not been established, then you may not consider a statement testified to as made here in the absence of such defendant, against that defendant, but it can only be consided against the person who made it."

MR. CHAVELLE: I take exception to the instructions of the Court relating to conspiracy. I contend there is no evidence of any such agreement.

THE COURT: Very well. You may retire, gentlemen of the jury. (Tr. pp. 119, 120). ,

The cases cited in support of the first assign-

ment of error in subdivision one are applicable here, but particular reference may be made to the case of *Hanger vs. United States,* 173 Fed. 59. There defendant's counsel objected to the admission of testimony and was overruled b ythe Court and duly excepted. Previously the Court seems to have admitted this statement of Menear on the ground that it was a declaration of a co-conspirator, for the Court charged the jury: That if they believe from the evidence that the defendant was an accomplice or co-conspirator with the witness, George Menear, for the making or passing of counterfeit coin, that any statement or confession made by Menear, while conspiracy between him and defendant existed is evidence against the defendant.

In this case there was an entire absence of evidence to prove the unlawful combination between Menear and the defendant. It is true that Menear stated to Washer, so Washer testified, that about the 1st of October, 1915, he, Menear, and the defendant entered into an agreement or conspiracy to make and pass counterfeit coin. But as to that fact the declaration of Menear was only hearsay. There is no rule which renders the declarations of an alleged conspirator, given second-handed, admissible to prove the existence of the conspiracy. Such declarations are made competent only *after the conspiracy had been shown to exist.* In this view the alleged declarations of Menear were clearly incompetent. If, however, the unlawful combination between Menear and the defendant had been establish-

ed so as to make the acts and declarations of Menear competent as evidence on the trial of the defendant, such acts and declarations of Menear as were committed or made in the *course* of the conspiracy and in furtherance of its object would have been admissible. The declarations of Menear which were admitted in the trial of this case, were as the record shows, after the overt act had been committed and the purpose of the alleged conspiracy had been accomplished. For these reasons the said declarations were inadmissible as evidence against the defendant.

In the case at bar it was after the arrest of Pappas, when he was taken to the prohibition director's office, that he made the declarations which were admitted against the plaintiffs in error, Ferguson and Thompson. Under this instruction of the Court, in which the Court admitted the general rule that "hearsay" evidence is in its own nature inadmissible. That this character of testimony pre-supposes some better testimony which might be adduced in the particular case is not the sole ground for its exclusion. Its intrinsic weakness, its incompetency to satisfy the mind of the existence of the fact and the frauds which might be practised under its cover, combine to support the rule that hearsay evidence is totally inadmissible.

And our own Circuit Court in *Dolan vs. United States,* 123 Fed. 52, reversed 116 Fed. 578, after granting a petition for rehearing, in said case said, "One of the instructions that is deserving of careful consideration reads as follows:

"If from the evidence you find that at the time Wilson Meisner made the statement as testified to by Palmer, the defendant Dolan was already in collusion and conspiracy with the defendants Allen and Hawkins, or, as a result of the communication of the statement made by Meisner, Dolan joined Allen and Hawkins soon following such statement, and that when said Wilson Meisner used this pronoun 'he' in the conversation referre dto by Palmer, he meant, and was understood to mean R. J. Embleton, it is circumstances you may consider."

While the Court in giving this instruction admitted what was, indisputably, hearsay testimony, he did not pretend to caution the jury that there ought not to be a conviction on such testimony without corroboration, and that the corroboration in the case must come from other evidence than the testimony of co-conspirators.

United States vs. Logan, 45 ed. 872, reversed on other grounds in 144 U. S. 263;
United States vs. Sacia, 2 ed. 754;
United States vs. Smith, 16 Fed. 322.

The whole question was a matter of the competency of the evidence, and addressed to the Court, not to the jury, and it was without the province of the jury to pass upon the competency of the evidence; and the Court instructed the jury, as heretofore, to find what it was wholly in his province to determine.

Stager vs. United States, 233 Fed. 510, page 513 (infra).